

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2012AP436
2012AP437**

**Cir. Ct. Nos. 2009CV1597
2010CV1552**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VARIN/REGAL, LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF KENOSHA,

DEFENDANT-RESPONDENT.

APPEALS from a judgment of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Varin/Regal, LLC appeals a judgment dismissing its excessive assessment actions against the City of Kenosha. Varin contends that the circuit court erroneously entered judgment

against it after it presented its cases in a trial to the court. We reject Varin's argument and affirm the judgment.

¶2 These appeals involve two related excessive assessment actions filed in the circuit court under WIS. STAT. § 74.37 (2009-10).¹ The actions challenged the 2008 and 2009 assessments of the subject properties, which are 127 of the 162 units in a condominium complex in the City of Kenosha known as Regal Pointe.

¶3 In 2003, Regal Pointe was constructed as a 162-unit apartment complex. In 2005, it was sold to a developer, Regal Pointe LLC, which decided to market the units as individual condominiums. Ultimately, the condominium project was a failure, as the developer was able to sell only thirty-five units, leaving 127 unsold. The developer defaulted on its loan, and the bank filed a foreclosure action in early 2008.

¶4 At the time the foreclosure action was filed, Varin was approached, among other investors, to purchase the note. Varin did so and then purchased the 127 unsold units as a single block at the sheriff's sale conducted in the foreclosure action.

¶5 Under the Wisconsin condominium statute, upon declaration of a condominium, each unit is assigned its own tax parcel number and is separately assessed and taxed. WIS. STAT. § 703.21. Thus, when the developer originally declared the property as a condominium, 162 separate tax parcels were created.

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

¶6 In 2008, the City assessed each of the 127 condominium units owned by Varin. The assessed value for each property varied, as the units ranged in size from 1,360 square feet to 1,520 square feet. The total amount of the assessments was \$17,389,600.

¶7 Varin appealed the assessments to the board of review, which sustained them. Varin then filed an excessive assessment claim, which the City denied. This action, along with a separate action challenging the 2009 assessments of the subject properties, followed.

¶8 In the circuit court, Varin presented its case through an expert appraiser named Peter Moegenburg. Moegenburg testified that the highest and best use of the subject properties as of January 1, 2008, was to operate them as rental apartments. Based on this conclusion, Moegenburg determined that the appropriate way to value the units was on an aggregate basis. Moegenburg testified that the aggregate value of the properties as of January 1, 2008, was \$11,750,000.²

¶9 At the conclusion of Varin's case in chief, the City moved for dismissal on the ground that Varin had failed to provide any evidence of the assessed value for any of the 127 tax parcels. Following briefing on the matter, the court issued a written decision granting the City's motion. It subsequently entered judgment against Varin. This appeal follows.

² By stipulation, the parties agreed to present only the 2008 issue to the circuit court and to have the 2009 resolution governed by the court's 2008 decision. Thus, only the value of the property as of January 1, 2008, was presented to the circuit court.

¶10 A claim of excessive tax assessment, under WIS. STAT. § 74.37(3)(d), requires review of “the record made before the circuit court, not the board of review.” *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶24, 294 Wis. 2d 441, 717 N.W.2d 803. WISCONSIN STAT. § 70.49(2) requires the reviewing court, like the circuit court, to give presumptive weight to the City’s assessment, unless the challenging party presents “significant contrary evidence.” *Adams*, 294 Wis. 2d 441, ¶25. We defer to the circuit court’s findings of fact. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶13, 317 Wis. 2d 228, 767 N.W.2d 567. However, the application of the law to the facts presents a question of law subject to de novo review. *See id.*

¶11 On appeal, Varin contends that the circuit court erroneously entered judgment against it after it presented its cases in a trial to the court. Varin complains that the court misconstrued the nature of the actions and what a court must consider before it can properly render a decision.³ Varin further complains that there was no basis for the court to grant the City’s motion to dismiss.

¶12 Here, the circuit court dismissed Varin’s actions primarily on the ground that Varin had presented its cases based on a market value that looked at the rental value of the combined properties. The court explained, “I have no problem with the concept of appraisal of the whole of the development ... as long as the next step, not taken by the plaintiff or its appraiser, properly apportions the

³ For example, Varin accuses the circuit court of injecting a new “cliff paradigm” into its analysis when it noted the need to determine when in 2008 the value of the subject properties “went off the cliff.” We view the court’s remarks regarding the cliff as simply shorthand for what was going on with the economy at that time of the challenged assessments.

appraisal among the constituent separate property units.” Because Varin did not take that step when presenting its actions, the court dismissed them on their merits.

¶13 Reviewing the circuit court’s decision, we agree that Varin failed to make a prima case when presenting its actions. As noted, Varin was the owner of 127 tax parcels that were required by WIS. STAT. § 703.21 to be assessed individually. Varin did not present any evidence at trial as to the value of the individual parcels. Instead, it presented only evidence as to the value of the parcels in the aggregate. Thus, the circuit court had no alternative value to consider for each of the individual parcels at issue. Because Varin did not meet its burden of establishing a prima facie case as to the excessive assessment of its individual parcels, we conclude that dismissal was appropriate.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

